

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

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Date:
November 19, 2019

LEGEND:

Authority =

State =

Bonds =

a =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear :

This is in response to your request for an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to file Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) to make a carryforward election under § 146(f) of the Internal Revenue Code (the “Code”) with respect to \$a of unused private activity bond volume cap.

Facts and Representations

Authority is a public housing agency authorized under State law to issue exempt facility bonds for qualified residential rental projects as defined in § 142(d). Authority planned to finance the development of a residential rental project (the “Project”) in part by issuing bonds intended to be tax-exempt under § 142(a)(7). In order to construct the Project, Authority put together a financing plan which combines equity from tax credit investors through the low income housing tax credit under § 42, several taxable loans, a loan from a non-profit health system, and an issuance of tax-exempt bonds under § 142(a)(7) (the “Bonds”).

The Bonds required an allocation of the private activity bond volume cap of State in the aggregate estimated amount of \$a. On Date 1, the State authority that allocates private activity bond volume cap among issuing authorities within State (the “Allocating Authority”) allocated \$a of its Year 1 volume cap to Authority (the “Year 1 Allocation”). The Allocating Authority’s resolution in which it made the Year 1 Allocation to Authority, states that if it elected to carryforward the Year 1 Allocation, Authority is responsible for preparing Form 8328. The Bonds would be the first bonds issued by Authority using private activity bond volume cap that required the filing of Form 8328.

Authority discovered on Date 2 as it was preparing to issue the Bonds that the Form 8328 for carryforward of the Year 1 Allocation had not been filed with the Internal Revenue Service (the “Service”). Upon discovery that Form 8328 had not been filed with the Service, Authority filed Form 8328 with the Service one day after discovery of the failure to file, on Date 3. This request was submitted to the Service on Date 4, ten days after discovery of the failure to timely file Form 8328.

Authority did not decline to timely file Form 8328 after being made aware in the Allocating Authority’s resolution of its obligation to file Form 8328 with the Service, and then reverse its decision after the filing due date. Authority is not filing Form 8328 to make the carryforward election in reaction to specific facts or circumstances that changed since the due date for filing Form 8328 so as to make the filing of the carryforward election advantageous to Authority. As of Date 4, the Service had not discovered Authority’s failure to timely file Form 8328.

Law and Analysis

Section 146(f)(1) provides that if an issuing authority’s volume cap for any calendar year after 1985 exceeds the aggregate amount of tax-exempt private activity bonds issued during the calendar year (by the authority), the authority may elect to treat all (or any portion) of the excess as a carryforward for one or more carryforward purposes.

The election is made by filing Form 8328 with the Internal Revenue Service Center, Ogden, UT 84201. Under Notice 89-12, 1989-1 C.B. 633, Form 8328 must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess

amount arises, or (2) the date of issue of bonds issued pursuant to the carryforward election. While Revenue Procedure 2005-30, 2005-1 C.B. 1148, provides for an automatic extension of six months from the due date of the carryforward election to make the carryforward election, it does not apply in this case.

The election must identify the purpose for which the carryforward is elected, and specify the amount to be carried forward for that purpose. Section 146(f)(2). Carryforward elections (and any identifications or specifications stated therein) are irrevocable. Section 146(f)(4).

Section 301.9100-1 of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, must be made under the rules of § 301.9100-3. Requests for relief will be granted if the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that, except as provided in § 301.9100-3(b)(3)(i) through (iii), the taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requested relief under that section before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(b)(3) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer --

(ii) Was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) Uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than the

taxpayer would have had if the election had been timely (taking into account the time value of money).

After discovering its inadvertent failure to timely file Form 8328 with the Service, Authority promptly filed the late Form 8328 on Date 3, and soon thereafter, on Date 4, submitted a ruling request for an extension of time to file Form 8328. As of Date 4, the Service had not discovered Authority's failure to timely file Form 8328. Thus, Authority requested relief before the IRS discovered the failure to make the regulatory election.

The Bonds would represent the first time Authority has issued private activity bonds requiring a carryforward of volume cap. The Allocating Authority's resolution in which it made the Year 1 Allocation to Authority did notify Authority of its obligation to prepare Form 8328. However, Authority's inexperience with the volume cap process led it to believe that it had received the allocation, and its focus was on putting together a complex, multi-party financing package to be ready to issue the Bonds. At no point did Authority decide to not file the Form 8328 for carryforward of the Year 1 Allocation.

Nor did Authority use hindsight in requesting an extension to file the Form 8328 for carryforward of the Year 1 Allocation. Authority is not filing Form 8328 to make the carryforward election in reaction to specific facts or circumstances that changed since the due date for filing Form 8328 so as to make the filing of the carryforward election advantageous to Authority. Based on all of the facts and representations submitted, we conclude Authority acted reasonably and in good faith upon discovery of the mistake.

No taxpayer will have a lower tax liability than if the election had been made timely. We also conclude that the interests of the government will not be prejudiced if we grant the relief requested by Authority.

Conclusion

Under § 301.9100-3, Authority is granted an extension of time to Date 3, to file Form 8328 for carryforward of the Year 1 Allocation. Therefore, the Form 8328 for carryforward of the Year 1 Allocation is deemed to have been filed timely.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with a Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The ruling contained in this letter is based upon information and representations submitted by Issuer and accompanied by penalty of perjury statements executed by the

appropriate parties. While this office has not verified any of the materials submitted in support of the request for a ruling, it is subject to verification upon examination.

Sincerely,

Assistant Chief Counsel
(Financial Institutions and Products)

By: _____/S/
Timothy L. Jones
Senior Counsel, Branch 5